

1 US BEVERAGE, INC.,

2 Plaintiff,

3 v.

4 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

5 INC.,

6 Defendants.

7 -----
8 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

9 INC.,

10 Counterclaim Defendants,

11 and

12 GRADY DOWLING KITTRELL, THOMAS GOING CLARK,

13 III, and NORMAN "BUDDY" TODD,

14 Third Party Defendants.

15
16 CIVIL ACTION NO.

17 2:06-CV-496-SRW

18
19
20
21 DEPONENT: Grady Dowling Kittrell

22 DATE: September 15, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

US BEVERAGE, INC.,
Plaintiff,
vs.
JOHN BUSTER WALKER,
II, and TRIDENT
MARKETING, INC.,
Defendants. CIVIL ACTION NO.
2:06-CV-496-SRW

JOHN BUSTER WALKER,
II, and TRIDENT
MARKETING, INC.,
Counterclaim
Plaintiffs,
vs.
US BEVERAGE, INC.,
Counterclaim
Defendant,
and
GRADY DOWLING
KITRELL, THOMAS
GOING CLARK, III, and
NORMAN "BUDDY" TODD,
Third Party
Defendants.

* * * * *

DEPOSITION OF GRADY DOWLING KITRELL,
taken pursuant to notice and stipulation on
behalf of the Defendant/Counterclaim
Plaintiffs, in the Law Offices of Copeland,
Franco, Screws & Gill, 444 South Perry Street,
Montgomery, Alabama, before Tiffany B.
Beasley, Certified Court Reporter and Notary
Public in and for the State of Alabama at
Large, on September 15, 2006, commencing at
8:39 a.m.

It is stipulated and agreed by and

between counsel representing the parties that
the deposition of **GRADY DOWLING KITRELL** may
be taken before Tiffany B. Beasley, Certified
Court Reporter and Notary Public in and for
the State of Alabama at Large, without the
formality of a commission; and all formality
with respect to other procedural requirements
is waived; that objections to questions, other
than objections as to the form of the
questions, need not be made at this time, but
may be reserved for a ruling at such time as
the deposition may be offered in evidence or
used for any other purpose by either party as
provided by the Federal Rules of Civil
Procedure.

It is further stipulated and agreed by
and between the parties hereto and the
witness, that the signature of the witness to
this deposition is hereby waived.

APPEARANCES

FOR THE PLAINTIFF/COUNTERCLAIM DEFENDANT/THIRD
PARTY DEFENDANTS:

C. NELSON GILL, ESQUIRE

Copeland, Franco, Screws & Gill

444 South Perry Street

Montgomery, Alabama 36104

FOR THE DEFENDANTS/COUNTERCLAIM PLAINTIFFS:

RAYMOND L. JACKSON, JR., ESQUIRE

CLIFF TUNNELL

660 North College Street

Suite D

Auburn, Alabama 36830

ALSO PRESENT:

THOMAS GOING CLARK, III

JOHN BUSTER WALKER, II

INDEX

<u>EXAMINATION</u>	<u>Page</u>
MR. JACKSON.....	7
<u>EXHIBITS</u>	<u>Page</u>
1 Letter from James R. Cooper, Jr., to U.S. Beverage, dated February 11, 2002	73
2 Agreement to Purchase Corporate Stock of Tropical Perfections, Inc., dated April 24, 2002	74
3 US Beverage Outline, Bates-Stamped US Beverage 096 through 097	153
4 Proposal for US Beverage Web Site, dated 10/14/04	164
5 Register4less Receipt, dated 8/9/04	165
6 Various Labels	185
7 Label	185
8 Letter from Ryan Hamner and John Walker to US Beverage, Inc., dated 5/24/04	197
9 Letter from US Beverage to John Walker, dated December 20, 2004, Bates-Stamped US Beverage 093	201
10 Letter from Mr. Walker to	203

1 Q. Okay. Anything else?

2 A. **Yeah. Sleepy Boys of Montgomery -- or, excuse**
3 **me, Sleepy Boys of Zelda. And, again, my**
4 **involvement in G&W is an investor.**

Q. Okay. And we'll get back to the specifics.

6 A. **Okay.**

7 Q. Go ahead and continue to list --

8 A. **Sleepy Boys of Cornerstone, Sleepy Boys of**
9 **Prattville.**

10 Q. Okay.

11 A. **The Mattress Source.**

12 Q. The Mattress Source?

13 A. **Uh-huh.**

14 Q. Okay.

15 A. **That's it.**

16 Q. Do you lease any property? Houses?

17 A. **What do you mean?**

18 Q. Do you lease houses, rent houses or --

19 A. **Do I personally? No, I own my home.**

20 Q. I'm talking about to other people as a
21 business, real estate.

22 A. **I personally don't. G&W does.**

23 Q. Okay. Well, tell us about G&W, then. Other

46

than leasing houses, what does G&W do?

2 A. **That's pretty much it.**

3 Q. How many investors are there in G&W?

4 A. **There are two.**

5 Q. Okay. I assume you and one other?

6 A. **Uh-huh.**

7 Q. Who is the other person?

8 A. **My father, Wilson Kittrell.**

9 Q. Do you have a position with G&W?

10 A. **No.**

11 Q. Do you have any other employees for G&W?

12 A. **No.**

13 Q. What are your duties for G&W? What do you do
14 for G&W?

15 A. **I co-sign on notes.**

16 Q. Anything else?

17 A. **No. Not currently.**

18 Q. What about any other time in the past?

19 A. **I formed -- I met with the attorneys to form**
20 **the LLC for my father.**

21 Q. Have you ever dealt with the renters?

22 A. **Oh, sure. I get calls at midnight when a pipe**
23 **is broken at my house.**

1 Q. Are you the main contact for G&W?

2 A. **No.**

3 Q. Who's the main contact?

4 A. **My father.**

5 Q. Do you do any of the maintenance work?

6 A. **Me personally?**

7 Q. Yes.

8 A. **Oh, heavens no.**

9 Q. Okay. Have you ever taken calls at US

10 Beverage from people that rent from you?

11 A. **Yes.**

12 Q. Is that frequent?

13 A. **No.**

14 Q. Have you ever had employees at US Beverage to
15 take calls from your renters?

16 A. **If it came through the receptionist**
17 **switchboard, yeah, I'm sure.**

18 Q. Do you ever give renters the number for US

19 Beverage as a contact number for them to call
20 you?

21 A. **There's an office number for G&W. Now, I have**
22 **been chased down by various means by my**
23 **tenants when they have problems, sure.**

48

1 Q. But you've never given the US Beverage number
2 to any of your tenants as a contact number to
3 call you?

4 A. **I may have.**

5 Q. Okay. Have you ever -- ever made leases on US
6 Beverage premises with renters?

7 A. **Sure.**

8 Q. Is that regular?

9 A. **Our tenants -- once they're in, they stay, so**
10 **I don't know what regular would be constituted**
11 **as.**

12 Q. Is it often that you meet with renters there?

13 A. **No.**

14 Q. How often -- how many times a month would you
15 meet with a renter there at US Beverage?

16 A. **To conduct leases?**

17 Q. Or any sort of business for G&W.

18 A. **It would be less than once a month at most.**

19 Q. How much of your time on a weekly basis, let's
20 say percentage basis, roughly, is taken up
21 dealing with G&W?

22 A. **Less than 1 percent. On a weekly basis?**

23 Q. Yes. Just an average week.

1 A. I'm not that involved in -- I spend two hours
2 a month doing the bookkeeping, and that's
3 about it.

Q. How many homes are y'all leasing through G&W?

A. I believe it's 13.

6 Q. Do you have any apartments you lease?

7 A. No.

8 Q. Is there any other activities through G&W,
9 selling real estate, subdividing?

10 A. There has been a house sold.

11 Q. Okay. Tell us about the -- your association

12 with Sleepy Boys. First, Sleepy Boys of

13 Zelda. Are you the -- I assume you're one of
14 the owners of the company?

15 A. Yeah. I'm a member of the LLCs.

16 Q. Okay. Are there any other members of the LLC?

17 A. Yeah. There's several.

18 Q. Okay. How many other -- just tell me how many

19 members of the LLC -- I assume it's Sleepy

20 Boys of Zelda, LLC; is that --

21 A. Yeah. Correct.

22 Q. Okay. How many members are there of that
23 company?

50

1 A. I think four.

2 Q. Okay. Who are the other three?

3 A. Norman Azar.

4 Q. Okay.

5 A. Wilson Kittrell and Tom Clark.

6 Q. Okay. Do you have a title with Sleepy Boys of
7 Zelda?

8 A. Not that I'm aware of.

9 Q. Okay. Do you perform any duties for Sleepy
10 Boys of Zelda?

11 A. Yes. I was actively involved in one
12 negotiation for them, but I'm not -- we have
13 managers that run that business, and my father
14 handles the maintenance and construction of
15 it.

16 Q. Have you ever conducted any business on US
17 Beverage premises related to Sleepy Boys?

18 A. Yes.

19 Q. What sort of business have you conducted
there?

21 A. I have met with the management team in the
22 conference room.

23 Q. How often do you do that?

1 A. At least once a week. And it usually is
2 around 7 o'clock p.m.

3 Q. Any employees of US Beverage do anything to
4 assist you with the business -- Sleepy Boys
5 business?

6 A. Yes.

7 Q. Okay. What -- describe that.

8 A. We have a -- a bookkeeper who has probably
9 looked at information and done things,
10 entries, or stuff to help us out on that.

11 Q. Anyone else?

12 A. Tom Clark.

13 Q. What does Tom Clark do for Sleepy Boys?

14 A. Nothing again. He reviews the financial
15 information to make sure it's been coded
16 correctly.

17 Q. How much of your time on a weekly basis is
18 taken up with -- well, we'll just put all the
19 Sleepy Boys together.

20 A. Yeah. Because it's all just --

21 Q. -- is taken up dealing with Sleepy Boys,
22 percentage-wise?

23 A. I can give you better than a percent. I

52

1 spend -- once a week I meet with the managers,
2 and then on Saturday mornings, I go down to
3 Auburn and meet with my chiropractor and get
4 adjusted, and I stop in the store in Auburn
5 for about an hour and a half and meet with the
6 managers again.

7 Q. And that's all you do for Sleepy Boys?

8 A. Is that all I do? That wouldn't be a fair
9 assessment. I mean, with any investment that
10 I have, even my IRA, I mean, I look at
11 financials, and I try to think about things
12 sometimes in mind share, I guess. But as far
13 as physical commitment, that's it.

14 Q. And is it the Sleepy Boys of Cornerstone
15 that's in Auburn? Which one is in Auburn?

16 A. The Mattress Source.

17 Q. Mattress Source is in Auburn. Okay. It's
18 through Sleepy Boys, though, they all -- I
19 know one is in Prattville. Are the other two
20 in Montgomery?

21 A. Yes.

22 Q. Are they all owned by the same members?

23 A. Yes.

1 Q. What about The Mattress Source? Does it have
2 the same members as the other --

3 A. Yes, sir.

Q. Any other businesses you're involved with that
we haven't discussed?

6 A. (Shakes head.)

7 Q. And you mentioned also GBD Holdings. Is that
8 the LLC that owns the building that --

9 A. Yes.

10 Q. -- US Beverage operates out of?

11 A. Yes, sir.

12 Q. Okay. Does GBD Holdings do any other business
13 other than own the building that US Beverage
14 operates out of?

15 A. Any other business? GBD does rent one space
16 to a tenant inside that building.

17 Q. So that's a tenant other than US Beverage?

18 A. Yes.

19 Q. And I assume US Beverage is a tenant, too?

20 A. Yes.

21 Q. Why don't you tell us how you first became
22 acquainted with Mr. Walker, my client?

23 A. Best of my recollection, we called on John --

54

or I personally called on John to sell him
2 Granita machines and parts.

3 Q. And where would you have called on John at?
4 Do you recall?

5 A. I believe at the time it was his office in
6 Phenix City.

7 Q. Did you sell any machines or parts to John at
8 that point?

9 A. No, there was no transaction.

10 Q. Okay. How did you -- how did it come that you
11 went from trying to sell John parts for his
12 Granita machines to actually bringing John in
13 your company? Will you just describe how
14 that --

15 A. Well, we were buying product -- the juice
16 concentrates at considerably less cost than he
17 was. We were buying machines and parts at
18 considerably less cost than his company was.
19 So we were trying to acquire him as a customer
because we felt there was margin there. At
21 some point, John came to us and talked about a
22 distribution arrangement, which we had no
23 interest in. So then the discussions

1 progressed. John and I met on several
2 occasions and discussed a buyout situation.

3 Q. Okay. When did those discussions begin?

4 A. I believe that the transaction occurred in the
5 spring of 2002, so it would have been probably
6 six months prior to that. It was from
7 probably October -- September or October of
8 the preceding year leading up into the
9 transaction actually being closed. We had
10 shot for a January 1 target date and couldn't
11 make it happen. But we started working
12 throughout that time to get some particulars,
13 logistics, things like that worked out through
14 that 90-day period prior to us closing. So we
15 actually started operating together sometime
16 just after the 1st of January. We started
17 working together towards making some decisions
18 on things. And it may have been prior -- it
19 may have been earlier in August.

20 Q. Well, what caused you to be interested in
21 bringing Mr. Walker and his company into US
22 Beverage?

23 A. Oh, there were several facets. We had already

56

1 done two acquisitions at the time -- excuse
2 me, one acquisition at the time. We had
3 acquired Gulf Coast Beverage, which was a very
4 similar business to both of our businesses,
5 again, selling juice concentrates. They were
6 primarily just product. No equipment. We had
7 completed that transaction, and we saw that
8 one of the ways to grow our business was to
9 acquire other companies. So there was an
10 interest there. His distribution routes were
11 within our footprint. We saw some expansion
12 possibilities. We thought it was good
13 business to acquire it.

14 Q. Okay. You said you saw some expansion
15 possibilities. What -- describe that more
16 fully for us.

17 A. Well, he had utilized those same concentrates
18 successfully with some chain accounts. He had
19 some business on his books that we wanted to
20 put into our portfolio. Sometimes it's less
21 expensive to acquire through a purchase than
22 it is to go out and beat the streets to get
23 it.

could not complete objectives and make decisions effectively with him being absent on a daily basis. Now, true, he would still need to travel and do the things he'd need to do, but he would need to be subservient to the corporate needs, as all of us should be as corporate officers. Those discussions happened often.

Q. Was there any minutes at the board of directors' meetings to reflect any of those discussions?

A. If I'm not mistaken, there may be some minutes from one where John Walker did agree and gave a designated time line that he would move back.

Q. Okay. Could you search your records and --

A. Be glad to.

Q. -- produce those to your attorney so he can produce those to us? And I think you also indicated that at one point, you said, Mr. Walker -- at least one point, Mr. Walker agreed to move back to Alabama. Would you describe to us when this disagreement occurred

78

and what you recall about that?

A. I recall early on Mr. Walker engaging in these conversations that he recognized that there was being -- problems being caused by his absence; that we could not have the synergies needed to run the company; and that we were off sync on what the company felt -- or the quorum felt was the objectives of sales versus what he felt because of his personal needs. And he even at that time had addressed that he felt if he was here with us every day, it would benefit him because he felt like he wasn't a part of the company at times. Both sides of the table felt it was imperative for him to come back and be active in the business.

Q. And when did these discussions occur?

A. These discussions occurred pretty early on.

Q. Well, how long after the acquisition? Are you talking months or years or --

A. No. No. It was within -- I would say it was within months. We had discussions on several occasions based on the welfare of Mr. Walker's

family what was going to be best as well.

Tough position for the company to be in to elevate a humanistic need over the company's need, and I feel we made a mistake in allowing that to happen at the time. But then we came back after the purchase of his home, discussed it at length, and had even made a proposal to offset the losses he may incur in selling his house in a down market if he would agree to move.

Q. Any of those discussions in writing?

A. I'll have to check.

Q. Specifically the offer to offset the sale of his house. Was that in writing?

A. Again, I'll have to look and see. We had so many discussions there. I mean, it was almost an on-and-on on the phone type of discussion, because, again, he was in Texas.

Q. Did Mr. Walker discuss with you what prompted him and his wife to move to Texas, why they were in Texas?

A. The only knowledge that I had of why he was in Texas was because of a job that Tiffany

80

possessed.

Q. And is Tiffany Mr. Walker's wife?

A. Yes.

Q. What did you know about that job?

A. That her father-in-law was the -- excuse me, her step-father had a position that had given her title to a position through nepotism.

Q. When you say "nepotism," is this your opinion or is this what Mr. Walker --

A. That was the way it was described to me.

Q. Do you recall Mr. Walker using the term "nepotism" to refer to his wife's job?

A. Oh, I think he probably used -- I cannot remember the gentleman's name, but because so-and-so was her step-father, you know, he set her up with this. She may be qualified. I can't answer that.

Q. Okay. And normally and when you use -- someone throws out the term "nepotism," usually it's inferring someone is not qualified to do their job, isn't it?

A. It can be. It can also be using the relationship status of family ties.

1 Q. Well, Mr. Clark had other business interests,
 2 too, didn't he?
 3 A. **No. Not at the time.**
 4 Q. Is he not involved in Sleepy Boys or mattress
 5 company?
 6 A. **Those came into existence about 90 days ago.**
 7 **Maybe 180.**
 8 Q. Did your association with those businesses
 9 come -- are you saying your association with
 10 those businesses is just 90 days ago?
 11 A. **Yes. Those companies were formed April of --**
 12 **April or May -- may have even been filed in**
 13 **June of this year.**
 14 Q. Were there other entities before those
 15 companies --
 16 A. **Just The Mattress Source.**
 17 Q. How long had The Mattress Source been in
 18 existence?
 19 A. **The Mattress Source was opened August or --**
 20 **August of last year, I believe, which was just**
 21 **an investment for me.**
 22 Q. When did Mr. Clark become associated with
 23 Mattress Source?

162

1 A. **He became associated by me giving him shares**
 2 **in the -- or membership interest in the**
 3 **company as a reward for some of the things**
 4 **that he and I have worked towards as far as**
 5 **developing. He was working hard; he was**
 6 **putting out the effort for US Beverage. As a**
 7 **gesture, I rewarded him with some shares.**
 8 Q. When did that occur?
 9 A. **That would have been August.**
 10 Q. Of last year?
 11 A. **Yeah.**
 12 Q. August 2005?
 13 A. **2005, yes, sir.**
 14 Q. And it's your testimony that you first became
 15 associated with the mattress business -- or
 16 the business of selling mattresses roughly
 17 August 2005?
 18 A. **I believe that the store opened July 27th**
 19 **of -- the business became engaged July 27th of**
 20 **'05, and I could be off on the date.**
 21 Q. That's your first involvement with the
 22 business of selling mattresses or bedding
 23 or --

1 A. **Yeah. That was -- that's my first endeavor as**
 2 **an investor.**
 3 Q. Did US Beverage ever ask Mr. Walker to sign an
 4 intellectual property agreement?
 5 A. **I brought to Mr. Walker's attention**
 6 **intellectual property.**
 7 Q. Well, and I'm not talking about -- we'll talk
 8 about that in a minute. But I'm talking about
 9 a written agreement. Let's just -- let's just
 10 talk about a written contract involving
 11 intellectual property.
 12 MR. GILL: I object to form.
 13 A. **No. We haven't presented him with a contract.**
 14 Q. What about a written confidentiality
 15 agreement? Did you ever...
 16 MR. GILL: Object to the form.
 17 A. **I would say I don't recall ever presenting him**
 18 **with a written confidentiality agreement.**
 19 Q. When did you first become aware of Trident
 20 Marketing?
 21 A. **I could not give a clear answer on that.**
 22 Q. You don't have any idea?
 23 A. **I do not recall when I first became aware of**

164

1 **Trident Marketing.**
 2 Q. What about Ryan Hamner, when did you first
 3 become acquainted with Ryan Hamner?
 4 A. **John Walker introduced us to Ryan Hamner.**
 5 Q. Do you recall when?
 6 A. **We were wanting to launch an Internet site to**
 7 **do e-commerce, and he had brought Mr. Hamner**
 8 **to us as a contractor to develop that Web**
 9 **site.**
 10 Q. Okay. We'll mark this as Defendants' 4 now.
 11 Okay. Defendants' 4. And ask you if you can
 12 identify that document for me, if you
 13 recognize it.
 14 (The referred-to document was
 15 marked for identification as
 16 Defendants' Exhibit No. 4.)
 17 A. **I believe I've seen this document.**
 18 Q. Was that a proposal from Ryan Hamner to
 19 provide Web site services for US Beverage?
 20 A. **It appears to be so.**
 21 Q. Did US Beverage ever retain Ryan Hamner to do
 22 Web site work?
 23 A. **No. Two things were requested by us at this**

1 sales and marketing manager. He went off and
 2 did that, we feel, with our resources and
 3 created a brand that we feel is intellectual
 property of ours and is an asset of US
 Beverage, though it may be registered
 6 somewhere else, and then came to us and
 7 declared that if we did not pay him for the
 8 use of that brand, he would take our business
 9 from us and those relationships that he had
 10 personal contact with and destroy us. So we
 11 engaged in buying that brand from him.

12 Q. And, again, let me ask you -- you know, when
 13 you said that he said he would -- are you
 14 saying that's a direct quote from Mr. Walker,
 15 that he would destroy US Beverage?

16 A. I've had several discussions with Mr. Walker
 17 where he has described either I pay him what
 18 he asks or he will seek to put us out of
 19 business.

20 Q. On how many occasions has he said that?

21 A. I would say more than four to five.

22 Q. Has he ever said that in front of anybody
 23 else?

174

1 A. Yes.

2 Q. Who?

3 A. Tom Clark, Buddy Todd.

4 Q. Who else?

5 A. I couldn't describe the other people that he
 6 may have said that in front of. He may have
 7 said that in front of his wife, possibly. I
 8 don't know.

9 Q. Well, being a person that's residing in Texas
 10 and you said he's not here in Alabama that
 11 much, how could he destroy your company?

12 A. Well, because he has proprietary accounting
 13 information to assist competitors in bids
 14 against us. He knows our purchasing price
 15 because he has our books. He has our customer
 16 list, which is in our books. And he can
 17 distribute that information to competitors so
 18 that they can seek to harm us in a vendetta.

19 Q. Well, but you earlier talked about him being
 20 set up to be the face of US Beverage to your
 21 customers, but you also testified that he's
 22 not here; he's in Texas.

23 A. That is true.

1 Q. How does he harm you as being the face of US
 2 Beverage when you -- I think part of your
 3 allegations is that he's not here?

4 A. Correct.

5 Q. He's not seeing your customers according to
 6 you; correct?

7 A. To us, it's still amazing how active he could
 8 get when he saw personal gain only and not the
 9 gain for the corporation. He became very
 10 active in trying to hurt the company. But,
 11 again, to have those books, that proprietary
 12 knowledge, to have our vendor contacts and our
 13 vendor pricing to pass to other competitors so
 14 that they may buy at the same price we had
 15 already negotiated and worked many years to
 16 obtain, that's very damaging to us.

17 Q. Let's talk about the creation of a brand.

18 When do you first recall -- and you and John
 19 Walker -- talking about US Beverage creating
 20 its own brand for slush products?

21 A. I would say that the discussion probably arose
 22 the minute that he came onboard with us.

23 Q. Who brought up that discussion?

176

1 A. Well, that discussion had been going on
 2 between Tom Clark and myself for a long time
 3 about developing a blanketed brand for all of
 4 our products. This was not a new discussion
 5 to US Beverage.

6 Q. Did John Walker ever approach you and ask
 7 you -- or ask you and Mr. Clark to invest
 8 resources toward creating an in-house brand?

9 A. We felt he asked us to invest excessive
 10 resources.

11 Q. What did he ask you specifically? Did he ask
 12 for a particular amount of money toward that?

13 A. Again, part of it was in the Ryan Hamner
 14 discussions, he was bringing friends or
 15 associates of his, not shopping the best price
 16 for us, we felt. And all we asked for was,
 17 please, get us several quotes on these type of
 18 things. We actually set up a marketing
 19 company to meet with Mr. Walker to assist him
 20 in this project, which Mr. Walker just
 21 wouldn't even engage in the conversations, was
 22 not eager to engage this other company to help
 23 us in the development of that brand, which was

one that we had all gone and met with. We had agreed to allocate some resources but not millions of dollars. We just didn't think that was a necessary function. We just didn't think that the brand development was going to cost that much. The value of the brand is based on the marketing and distribution of the brand.

Q. Is it your testimony today that John Walker asked the company to invest millions of dollars toward the creation of a brand?

A. No. I said we did not feel that we needed to.

Q. Okay. Well, I'm asking you what your recollection is of what Mr. Walker asked in terms of financial resources from US Beverage to help to create a brand.

A. I would say that the initial discussions were in excess of \$5,000.

Q. And you thought a \$5,000 investment in a new brand was excessive?

A. I thought that the way that he wanted to allocate the funds could be perceived to be excessive. I thought we could have come up

178

with several names to start exploring development of, as opposed to paying a Ryan Hamner or someone 5,000 just for a logo.

Q. And is that your testimony, that he proposed to just spend \$5,000 paying Ryan Hamner, and that was the only thing he proposed to you in terms of --

MR. GILL: Object to the form.

A. No. That would not be. I've misstated that.

Q. Okay. Well, and I misunderstood you, so you can clarify that.

A. We did not feel that the amount of money was necessarily the issue. We felt that the amount of focus that John Walker wanted to designate to that project was a little -- we still felt he needed to be selling day to day and working on that project in his spare time, not that that became the focus; that those resources were better used day to day making sure that our accounts were taken care of; that the cash flow of the business was secure so that we could pay our bills and continue to grow and then develop a brand through that.

Q. Okay. Just to make sure I understand, I guess at some point there was a decision made that US Beverage, first, doesn't want to spend the money that Mr. Walker had proposed, or however he had budgeted the money; and, secondly, that the other members of the company wanted Mr. Walker to spend his time on developing customers rather than developing a new brand; is that --

MR. GILL: Object to the form.

A. No, that's not accurate.

Q. Okay. Well --

A. We feel that the majority of his time should have been spent on the day-to-day business that US Beverage was engaged in. But that the marketing is a very essential part of what we do. We are nothing more than a marketing company. That is what we do. We take a product; we go to the streets and we market and we sell; and then we distribute. It's all a function of marketing. We felt that a brand was important to us, but at the time when you cannot pay your bills, the most important

180

thing -- not to lessen the importance of a brand -- but the most important thing was to continue the path that we had all signed off on and to develop the brand as an addition to the marketing plan, not that the sole function of John Walker came to be a brand-development manager. That was not the direction we wanted to go.

Q. When did you first hear the name Juice Alive?

A. I would say the first recollection I have of Juice Alive as a name would have been at the time -- I could not give you a definite date on that.

Q. Did you come up with the name Juice Alive?

A. No.

Q. What about Mr. Clark; do you think he -- are you contending he came up with the name Juice Alive?

A. I do not think he did.

Q. Well, do you think the first time you heard about the name Juice Alive would have been from John Walker?

A. Yes, I believe that.

1 Q. Are you aware of a Web site being created for
2 that purpose?
3 A. **Yes, I am.**
4 Q. Are you aware of US Beverage obtaining
5 referrals from that Web site for customers
6 within this designated area that US Beverage
7 was to sell the Juice Alive brand day care
8 juice?
9 A. **Yes, I am.**
10 Q. I'm going to ask you to look at some materials
11 here, and I'm going to mark these Defendants'
12 6 and 7 -- and, actually, 7 is a
13 black-and-white reproduction of the first page
14 of 6, but -- and I've done that because the
15 originals are in color, and they're hard to
16 reproduce so -- and they're hard to read, too,
17 so...
18 (The referred-to document was
19 marked for identification as
20 Defendants' Exhibit No. 6.)
21 (The referred-to document was
22 marked for identification as
23 Defendants' Exhibit No. 7.)

186

MR. JACKSON: We'll go another five
or ten minutes, and we'll
stop.

4 A. **Those are two different --**
5 Q. Yeah -- well, the -- like I said before,
6 Defendants' 7 is a black-and-white
7 reproduction of the first page of 6.
8 A. **Okay.**
9 Q. And it's just a different reproduction
10 because this is quite -- the color one is
11 quite hard to read, and we had another version
12 that was in black and white. Can you identify
13 those documents -- the first -- the first
14 page, can you identify that?
15 A. **Yeah.**
16 Q. What was that?
17 A. **It is a -- appears to be a label for product.**
18 Q. Would it have been a label for the day care
19 product, day care juice product we talked
20 about?
21 A. **It could possibly be a label for that, yes.**
22 Q. Have you seen this label before?
23 A. **I've seen similar labels for sure.**

1 Q. Do you know who created the label or who
2 designed it?
3 A. **I would assume that Ryan Hamner had actually
4 done the design work.**
5 Q. And is that based on your conversations with
6 Mr. Walker?
7 A. **Correct.**
8 Q. Did you ever talk to Mr. Hamner about the
9 Juice Alive arrangement we've been talking
10 about?
11 A. **No. I never had any discussions with
12 Mr. Hamner about it. I expected the
13 vice-president of sales and marketing to
14 handle his responsibility for the company on
15 behalf of the company, is what I had done.**
16 Q. Okay. Just a second. Let me look at
17 Defendants' 7 and see if I can keep my copies.
18 Did Ryan Hamner ever meet with you and Tom in
19 Montgomery at the US Beverage offices?
20 A. **Yes. With John Walker present.**
21 Q. During those meetings, did you discuss Juice
22 Alive?
23 A. **Juice Alive specifically, no. What I was**

188

1 **involved in discussion that I was a**
2 **participant to was the discussion where I had**
3 **said, John, can we not please get Mr. Hamner**
4 **to give us some sort of prototype of what he's**
5 **talking about on this Web site development.**
6 **And Mr. Walker just kept informing me, we need**
7 **to pay him up front, and I just didn't think**
8 **that was prudent for the company.**
9 Q. Well, let's look at Defendants' 7, which is a
10 black-and-white reproduction of the label you
11 have there in color. Read the last two lines
12 of that.
13 MR. GILL: Can I have one?
14 MR. JACKSON: Oh, I'm sorry.
15 A. **I'll be honest with you, I can barely make it**
16 **out. It looks like juicealive.com.**
17 Q. Do you see the next line? Does it say MFG?
18 A. **Uh-huh.**
19 Q. Next word "for"?
20 A. **Yeah.**
21 Q. Juice Alive, comma?
22 A. **Yes, sir.**
23 Q. Columbus, Georgia?

intention -- at least the documents produced by -- or created by US Beverage or you, the intention of which was to create an exclusive distributorship everywhere?

A. That was our intention, was to be the sole distributor for that product. We felt it was our product brand.

Q. In the entire US?

A. In the entire US that we could set up sub-distributors through us and things like that for other means of distribution, but that it would all flow through US Beverage. The references were to direct distribution, that we would handle directly, not as a support agent coming through us. We never intended to give our company away. That was not the intention of our documents.

Q. I guess as we said before, the documents will speak for themselves. But let's go to the next document, then. Mark this Defendants' Exhibit No. 16 and ask you if you can identify it. Have you seen this document before?

(The referred-to document was

230

marked for identification as

Defendants' Exhibit No. 16.)

A. Yes, I have.

Q. Can you identify it for the record?

A. It is a correspondence between Gary Dukes and Tom Clark.

Q. Does that appear to be Tom Clark's signature at the bottom?

A. Yes, it does.

Q. Do you have any reason to believe that this did not come from Tom Clark?

A. No, I do not.

Q. If you'll read the first line -- just read the first sentence of the -- underneath "Gary." Read it aloud for the record.

A. You need me to read it out loud?

Q. Yes, sir.

A. Okay. (As read:) We have reached an agreement with Juice Alive to start distribution of the Juice Alive brand in our 100 percent juice products.

Q. Just keep reading. Read the second sentence, too.

(As read:) Please let this signed fax serve as official authorization for you to begin selling to US Beverage, Inc., the Juice Alive product with \$1.20 increase per case to be paid to Juice Alive.

Q. Okay. And this document is US Beverage agreeing to pay Juice Alive for the right to distribute the Juice Alive product?

A. This document is authorizing that, under duress, US Beverage, for fear of losing accounts based on proprietary information, we were willing to engage in a contract that we were being coerced into to protect the business at hand, which was the distribution of 100 percent juice products through the vehicle US Beverage.

Q. Let me ask you, you mentioned the word of "duress." There's different forms of duress. And your attorney can -- I'm sure has told you that. Are we talking about physical duress?

A. I'm talking physical, emotional, financial.

Q. Well, I'm just asking about physical. What sort of physical duress were you or Tom Clark

232

under when you signed this document?

A. The financial pressures revolving around which causes --

Q. And let's --

A. That's physical duress to me. I can't sleep; I can't eat; I'm sick all the time. I have physical duress over the financial stability of my company.

Q. Okay. At any point did Mr. Walker threaten violence against you or your person if you didn't sign this agreement?

A. On several occasions Mr. Walker has threatened violence by threatening that he was an ex-navy SEAL, and he could kill us at will. Not this document, but we have been threatened on many occasions.

Q. Okay. Now, let me make sure I understand. Are you testifying today that Mr. Clark signed this document on behalf of US Beverage because he had been threatened physically?

MR. GILL: Object to the form.

A. I believe that any human who has been threatened with physical violence will always

learning of or are alleging?

MR. JACKSON: Just asking the

question.

A. Well, and again, that was when I was aware that -- I thought he was looking to create a competitive situation. You know, again, unfortunately, as I think I became aware of these things, as we started discovering them, looking into them, we felt already that our business was in jeopardy with the knowledge that John Walker possessed, so I cannot give you an exact incident, again, that would be next in the time line.

Q. Okay. Well, why don't we just kind of, if you can, any -- just state for the record any instances of competition that you allege Mr. Walker has engaged in?

A. Well, we -- we allege that -- or I personally would allege that any time that he would hold a personal guarantee after we had voted to seek financing or funding, that he used that to restrain the corporation. The fact that he was not out selling on our behalf actively, I saw as a restraint of our trade. The fact that he would come to us with accounts and

A. No.

MR. GILL: Well, that's not what he said.

MR. JACKSON: I'm not saying that's what he said. I'm just asking --

A. No, that is not what I --

MR. JACKSON: That's what my client said.

A. And I'm saying, no, I did not.

MR. GILL: No. But you were representing it as his prior testimony.

MR. JACKSON: No. I'm representing it as a statement he made. Not here today.

MR. GILL: All right. That's fine. But I just don't want you to represent it as testimony that was made earlier today if he hasn't made it.

say, if you don't do the Juice Alive, I'm not going to give you -- you know, I'm not going to turn in these customer profiles; I'm not going to let you know where I've been calling on; the fact that we were alerted to the schools that he was doing business with in North Carolina.

Q. When were you alerted of that?

A. Again, I do not have a -- I would have to sit down and try to create a time line.

Q. Was it before or after you cut off Mr. Walker's salary?

A. It was prior. It was a -- maybe even a year prior. And, again, let me state for the record, we did not just cut off Mr. Walker's salary. We all agreed to take no pay until the company became financially able to maintain that again. Mr. Walker chose not to work.

Q. Didn't you tell Mr. Walker that -- that you weren't going to pay him unless he entered into a buyout agreement with the company?

MR. GILL: Object to the form.

Q. Okay. Any other instances of competition other than what we've talked about?

A. We did -- we were alerted to -- I think Mr. Walker described or you had described to me via Mr. Walker's testimony yesterday, that he had handed over some Web site leads. One of the things I think we found was that he and Ryan Hamner, under Trident Marketing, were trying to sell to these people or were selling, and we actually found that out and said, you need to turn those over to us; those are rightfully ours.

Q. Okay. Anything else?

MR. GILL: What are you talking about? Are you talking globally?

MR. JACKSON: I'm talking about you're suing my client for competing with the company. I'm just asking him to list any instances of competition with US Beverage.

A. Oh, you want me to go through the whole -- the

1 Q. Response, yes.
2 A. **And, again, I'll have to confer with my**
3 **attorney to see if some of that is**
4 **client-counsel privilege.**
5 Q. And, again, I'm not asking you to tell me
6 anything you told your attorney or your
7 attorney told you.
8 MR. GILL: I mean, are you just only
9 asking him what --
10 MR. JACKSON: How did they respond?
11 What's the response? He
12 mentioned there was instances
13 of competition there at least
14 going back to 2004, and I'm
15 just asking how the company
16 responded.
17 A. **I'm not asking you to tell me anything your**
18 **attorney said or you said to your attorney.**
19 MR. GILL: I mean, that's a pretty
20 vague question in terms of --
21 I mean, are you talking two
22 years, how the company
23 responded?

250

1 MR. JACKSON: Yes. Yes, I am.
2 MR. GILL: I mean, today we've got a
3 lawsuit here. I mean --
4 MR. JACKSON: Well, again, today --
5 it was filed in June 2006.
6 But we've got instances of
7 alleged competition that go
8 back to 2004. I'm asking how
9 the company responded. The
10 timeliness of the response is
11 as important as this lawsuit.
12 A. **Well, again, we sought to find amicable**
13 **resolution and were stone -- we feel**
14 **stonewalled at every turn. No matter what we**
15 **tried to put out there to get an amicable**
16 **solution, the ante was upped every time**
17 **excessive -- excessive requests on the part of**
18 **Mr. Walker, well above and beyond any**
19 **valuations. We also got our strategies in**
20 **place to be a formidable competitor. We did**
21 **put Mr. Walker on notice. We did have an**
22 **emergency shareholders meeting to relieve him**
23 **of some corporate privileges so that he could**

1 no longer hurt us. And, again, I think we
2 acted very judiciously by making sure that we
3 had our facts in order; we tried to move in a
4 judicious manner and not just let our emotions
5 overrun us; and we took a long methodical
6 strategy to put US Beverage first, maintain
7 the growth and the financial stability of the
8 company so that we could endure what we
9 perceived to be an aggressive act by a
10 corporate officer and shareholder and former
11 partner -- or current partner that had
12 proprietary knowledge of what we did on a
13 day-to-day basis and also utilized the
14 contacts and relationships and price points
15 that we had negotiated on behalf of US
16 Beverage to harm us.
17 Q. This emergency shareholder meeting you
18 mentioned, is that the one that occurred in
19 May of 2006?
20 A. **If that was the -- if that was the day of the**
21 **one conducted at Charles Edmondson's office.**
22 Q. The one -- was the result of a line of letters
23 sent by Mr. Edmondson to John Walker?

252

1 A. **Correct.**
2 Q. When you found out that Mr. Walker was selling
3 juice products in North Carolina schools in
4 2004, did you ask him to stop?
5 A. **We asked him to turn the accounts over to US**
6 **Beverage. We felt that they were done on**
7 **behalf of US Beverage and that they should be**
8 **part of US Beverage's business.**
9 Q. When did you ask him to turn them over?
10 A. **I would say within two days of being notified,**
11 **I contacted John Walker and asked him if that**
12 **had really happened, and he said, yeah. And I**
13 **said, why did you do that? And he said,**
14 **because I have to protect myself against you**
15 **and Tom. And I said, John, at this point, I**
16 **feel it's your fiduciary responsibility; you**
17 **were charged with development of that state**
18 **and the growth of this company; that is**
19 **business that is directly in competition with**
20 **us, and it's deserved to US Beverage.**
21 Q. So it's your testimony that John refused to
22 turn the accounts over?
23 A. **Absolutely.**

1 Q. As of April 20, 2006, were you aware that
2 Tiffany Walker was pregnant at that time?
3 A. **Yes, I was.**
4 Q. Did you authorize Mr. Edmondson to send this
5 letter?

6 A. **Yes, I did.**

7 Q. Did it not concern you to terminate health
8 benefits for someone who's pregnant?

9 MR. GILL: Object to form.

10 A. **It concerned me that US Beverage, which my**
11 **responsibility as a corporate officer to**
12 **protect, was under attack, and, yes, it does**
13 **concern me that she's a human and may have**
14 **health rights.**

15 Q. Let's move on. And just to finish up what we
16 had asked a few minutes ago, after Mr. Walker
17 told you that, no, he was not going to turn
18 the accounts in North Carolina, the schools,
19 over to you -- and I've asked you before, but
20 is it your testimony today that you didn't
21 take any legal action -- and, again, I'm not
22 talking about talking to your attorney; I'm
23 talking about some sort of legal action toward

258

1 Mr. Walker -- until 2006?

2 MR. GILL: Object to the form. I
3 mean, I think that the legal
4 action speaks for itself.

5 But go ahead and answer
6 it.

7 A. **I'm not sure -- when you say "took legal**
8 **action" --**

9 Q. Well, I'm talking about -- and let me define
10 that. In terms of legal action, I'm talking
11 about any sort of action directed toward
12 Mr. Walker legally, whether it's a
13 cease-and-desist letter; a lawsuit filed in
14 any state; there's an attempt to get a court
15 order, any type of action legally toward
16 Mr. Walker. And, again, I'm not talking about
17 talking to your attorney. I don't care what
18 you and your attorney said to each other.

19 MR. GILL: Object to the form.

20 A. **Well, again, we sought advice of counsel as to**
21 **how to proceed and formulated a strategy to**
22 **act on so that we would be judicious and that**
23 **we would try to protect the company in every**

1 means possible in that strategy.

2 Q. In 2004 did you send a cease-and-desist letter
3 to Mr. Walker telling him to stop doing
4 business in North Carolina?

5 A. **I do not believe I did.**

6 Q. In 2005 did you send a cease-and-desist letter
7 or have anyone else send a cease-and-desist
8 letter to Mr. Walker asking him to stop doing
9 business in the state of North Carolina?

10 A. **I do not believe we did.**

11 Q. Okay. What about in 2006? Prior to the
12 filing of this lawsuit, do you recall a
13 cease-and-desist letter, any cease-and-desist
14 letter being sent by any attorney or by you or
15 anyone else on behalf of US Beverage?

16 A. **I do not recall.**

17 Q. Okay. What about prior to this lawsuit? Was
18 there any other litigation filed anywhere, you
19 know, whether it's by this attorney or
20 Mr. Edmondson or anyone else, involving John
21 Walker and US Beverage?

22 MR. GILL: Is the question, had he
23 filed a prior lawsuit?

260

1 Q. Yeah. Or US Beverage. Had US Beverage filed
2 a prior lawsuit or any action, request for
3 injunction, anything -- any legal filing in
4 any state anywhere with any attorney?

5 A. **No.**

6 Q. Move on. Let me ask you a little bit about
7 Cool Tropics. When you were selling Cool
8 Tropics' products, did you pay a case
9 up-charge to the owner of the Cool Tropics
10 brand?

11 A. **We paid a fee to use the Cool Tropics.**

12 Q. Brand? Yes?

13 A. **Yes. To use that label.**

14 Q. Okay. And was that in addition to the cost of
15 the actual product itself?

16 A. **Correct.**

17 Q. Do you recall what that case up-charge or what
18 the charge would have been to use the Cool
19 Tropics label?

20 A. **No. When we bought Tropical Perfections,**
21 **there was a case price of -- if I'm not**
22 **mistaken, it was around 32 or \$34 a case.**
23 **After we acquired Tropical Perfections, we**

been paid to BLR?

A. I would say Tom Clark would know.

Q. Okay. Why did your company decide to create the Fruzers brand?

A. We felt that with the Juice Alive situation, that there was market confusion, and we felt that the behavior of an officer and employee of ours in misrepresenting that brand was causing damages.

Q. Well, has the Fruzers brand been successful?

A. We feel it's been very successful.

Q. Are you happy with the Fruzers brand?

A. We're happy with the distribution and sale of the products that we sell.

Q. Do you plan to continue using Fruzers as the brand.

A. I would say at this point that is our marketing strategy.

Q. If you were to be successful in this case and be awarded Juice Alive, do you plan to stop using Fruzers and start using the Juice Alive name?

MR. GILL: Object to form.

334

A. I would have to -- again, that would be a meeting that our team as a marketing team and sales-driven team would have to meet on at that time and juncture. If it's 20 years from now, if it's two days from now -- there would be too many variables for me to even speculate.

Q. Do you think Juice Alive is a better brand name than Fruzers?

MR. GILL: Object to the form.

A. I feel that we have put an intense amount of effort into whatever it is that we represent.

Q. I'm just asking your opinion.

A. In my opinion do I think --

Q. You've been in this business a long time. In your opinion, what's a better brand name for a juice product, Fruzers or Juice Alive?

A. I think it's subjective. I could say that I prefer some of the -- the marketing appeal that Fruzers brings.

Q. Let me show you another document I'm going to mark as Defendants' 28 and ask if you can identify that document for me.

(The referred-to document was marked for identification as

Defendants' Exhibit No. 28.)

A. Okay.

Q. Okay. Would you characterize this as a cease-and-desist letter?

A. Not being an attorney, I wouldn't know how to characterize it, to be honest.

Q. Let's look at the fourth paragraph of that letter and ask you to read that sentence starting with the word "accordingly."

A. Okay.

Q. Read it aloud, please, for the record.

A. (As read:) Accordingly, US Beverage asks that Trident Marketing and John Walker cease and desist from using the brand name Juice Alive, as it is property of US Beverage.

Q. And having read that sentence, would you consider this to be a cease-and-desist letter that was sent by attorneys for US Beverage to John Walker and his company, Trident Marketing?

A. Yes.

336

Q. And, again, did you ask -- did your attorneys ask on behalf of US Beverage that Trident Marketing and John Walker cease using the name Juice Alive?

A. Yes.

Q. Did they have direction -- did your attorneys have direction and authority from your company to issue this cease-and-desist letter?

A. Yes.

Q. Is this the first cease-and-desist letter that would have been issued on behalf of US Beverage to John Walker or Trident Marketing?

A. I would have to say yes.

Q. And what's the date of this letter?

A. June 19, 2006.

Q. Okay. Thank you.

MR. GILL: I would guess you're going to produce this now, and I don't have to produce it?

MR. JACKSON: I'm sorry.

MR. GILL: Since you marked this with your Bates number. I mean, this is what I gave you